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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1453

GORDON O'BRIEN,
Petitioner,
v.
FRANK A. HALL,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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Petitioner, Gordon O'Brien, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit, entered on December 29, 1976, Petition For Rehearing denied on January 20, 1977.

OPINIONS OF THE COURTS BELOW

The United States Court of Appeals for the First Circuit ordered that its opinion was "NOT FOR PUBLICATION", so petitioner assumes it will not be reported, but it is set out in Appendix A hereto, pages 27 - 33, infra. The opinion of the United States District Court for the District of Massachusetts, which was reversed by the Court of Appeals, is set out in Appendix B hereto, pages 34 - 49, infra, but it too will not be reported, in accordance with Appendix B of the Rules of the United States Court of Appeals for the First Circuit.

JURISDICTION

The judgment of the court below was entered on December 29, 1976, and a Petition For Rehearing was denied on January 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1), since petitioner seeks review of a decision of a court of appeals.

QUESTIONS PRESENTED

The Massachusetts Commissioner of

Corrections ordered the petitioner into disciplinary solitary confinement without notice or hearing. He remained there for seven weeks until charges were devised and Disciplinary Board hearings held. While attempting to establish cause for petitioner's confinement, the hearings themselves did not afford him his limited due process protections. Petitioner remained in solitary for more than a year. There were no solitary confinement cells in the prison where petitioner was a "trusty" in "general population," so he had to be moved to another prison in order for the respondent to effectuate his solitary confinement.

1. Did the lower court err in holding that since in its view the power to transfer prisoners is unbridled in Massachusetts, and petitioner's solitary confinement and hearings were preceeded by a transfer from one prison to another, both his confinement and the hearings were insulated from constitutional attack in this Federal Civil Rights Act case?

2. If this prisoner must demonstrate that he had "some right or justifiable expectation rooted in state law" in order to be afforded some limited protections of the Due Process Clause, did the Massachusetts prison

disciplinary regulations then in effect create such a right?

While not presented herewith as a ground for the issuance of the writ, if it issues, a subsidiary question "on the merits" would also be presented:

a. Was petitioner denied the limited Due Process protections to which he was entitled at the Disciplinary Board hearings, and was it, therefore, error for the Court of Appeals to reverse the District Court and dismiss the complaint?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1., Fourteenth Amendment, Constitution of the United States of America (in relevant part): "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law;...."

Just the relevant parts of the Massachusetts prison disciplinary regulations, D.O. 4310.1, Disciplinary Process — Rules and Regulations, are lengthy, so their pertinent text is set forth as Appendix C hereto, pages 50 -56 , infra.

STATEMENT OF THE CASE

On September 16, 1975, petitioner was a prisoner with, so-called, "trusty" status in, so-called, "general population" at the Massachusetts Correctional Institution at Bridgewater. On that date the Massachusetts Commissioner of Corrections, the respondent herein, ordered that petitioner be put in strict solitary confinement. The opinion below erroneously implies that the decision on solitary confinement was sometime after the transfer. There were no solitary confinement cells at Bridgewater, so, solely to effectuate the solitary confinement order, petitioner was moved to the strict solitary confinement section —so-called, "Ten Block"—in the nearby Massachusetts Correctional Institution at Walpole. The only reason for the geographical move was because Bridgewater did not have confinement cells sufficiently solitary for the respondent's purpose of isolating the petitioner. It is admitted that at least this "transfer resulted in a significant adverse modification of the overall conditions of confinement" of petitioner, and that it was accomplished with no prior notice or hearing.

The respondent then initiated an investigation into inmate conditions at Bridgewater with

particular emphasis upon whether petitioner had been one of the leaders of a group of prisoners who assaulted and intimidated other prisoners. After seven weeks--petitioner remaining in solitary confinement in Ten Block the whole time (a fact ignored in the opinion below)--on November 5, 1975, six disciplinary charges were brought against petitioner (a seventh was later brought during the disciplinary hearings) alleging, solely on the basis of "informants'" information, assaults on various Bridgewater inmates on various dates, going back more than a year, and Disciplinary Board hearings were scheduled on those charges. The next day petitioner filed a pro se complaint under 42 U.S.C. § 1983 in the United States District Court for the District of Massachusetts, which was subsequently amended by counsel, and upon which the actions in issue were taken.

Disciplinary Board hearings on the charges began on November 14, 1975, continued on four later dates, and concluded on December 10, 1975, at which petitioner was represented by counsel, and transcripts of the hearings were prepared. In the course of the hearings two of the charges were withdrawn, and petitioner was found not guilty on one and guilty on the remaining four. The Disciplinary Board recommended thirty days

"isolation" (a Massachusetts corrections "term of art," consisting of the only confinement even more solitary than Ten Block segregation). In the course of the preliminary injunction hearings on petitioner's complaint, the respondent, as reviewing authority, affirmed the Disciplinary Board actions, but suspended execution of the "isolation" time specifically because of petitioner's already lengthy Ten Block confinement.

Petitioner's Federal Civil Rights Act complaint alleged that his transfer from Bridgewater, his Ten Block confinement without charges or hearings, and the subsequent Disciplinary Board procedures each violated his constitutional rights. After extensive evidentiary hearings on his preliminary injunction prayer to at least be released from Ten Block and returned to "general population," Julian, J. on April 28, 1976, filed a lengthy Order (Appendix B, pages 34 - 49, infra) granting a preliminary injunction releasing the petitioner from Ten Block and ordering his transfer to "general population" anywhere in the Corrections system except Bridgewater or Walpole, because he had been denied due process of law in the course of the Disciplinary Board

hearings. The transfer aspect of the complaint was not reached. The respondent appealed, and at his request Judge Julian stayed execution of his injunction order. The petitioner cross-appealed the scope of the order.

Just before briefs were due to be filed in the United States Court of Appeals for the First Circuit, this Court reversed Fano v. Meachum, 520 F. 2d 374 (1st Cir. 1975), sub nom. Meachum v. Fano, 427 U.S. 215 (1976), and in the court below the petitioner, therefore, admitted that he was now foreclosed from pressing any damages resulting solely from the geographical transfer from Bridgewater. (That issue was not involved in the appeal, since, as noted, the district court had not addressed it.) However, petitioner maintained that this Court's opinion in Meachum did not vitiate the unconstitutionality associated with his solitary confinement and his subsequent Disciplinary Board hearings, and that he was entitled to limited Due Process protections, both on the basis of the Constitution itself and rights with "roots in state law." The Court of Appeals held that Meachum "leaves plaintiff's case in shreds", vacated the injunction, and remanded with instructions to dismiss. Petitioner

sought rehearing, pointing out that the court had not addressed the state law issue, and that he had demonstrated a sufficient "liberty interest" to trigger Due Process protections. Rehearing was denied without opinion and this petition duly presented herewith.

REASONS FOR GRANTING THE WRIT

Because petitioner's disciplinary solitary confinement necessitated his transfer from a prison where he was in "general population" to a prison having solitary confinement cells, the lower court here read Meachum v. Fano, 427 U.S. 215 (1976), as insulating his subsequent solitary confinement and his disciplinary hearings from constitutional attack, even though it was admittedly accomplished without due process of law, because, as the court viewed Massachusetts law, the power to transfer prisoners was unbridled. The court said that Meachum "drastically changed the climate for prisoners' due process claims. Now these claims must withstand a strict preliminary test: the prisoner must show that he has been deprived of a 'liberty interest' at the hands of the state. And, in this corner of due process at least, 'liberty' is largely defined by state law and by the specific guaranties of the federal constitution."

Appendix A, page 32, infra. Since its unpublished opinion in this case, the First Circuit has twice more made its position even clearer.[1] Petitioner maintains that this is a dangerously mistaken reading of several of this Court's opinions in this important and burgeoning area of prisoners' rights, and unless the Court corrects this error and clarifies the law, even greater injustices will perforce follow. Since Meachum, two other Circuits, and at least one district court already share this First Circuit aberration.[2] However,

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[1] Lombardo v. Meachum, ___ F. 2d ___ (1st Cir. 1977), No. 76-1265, January 20, 1977; Four Certain Unnamed Inmates of Massachusetts Correctional Institution at Walpole, Mass. v. Hall, ___ F. 2d ___ (1st Cir. 1977), No. 76-1554, March 18, 1977.

[2] Franklin v. Fortner, 541 F. 2d 494 (5th Cir: 1976); Cooper v. Riddle, 540 F. 2d 731 (4th Cir. 1976); Martinez v. Oswald, 425 F. Supp. 112 (W.D.N.Y. 1977)

a third Circuit, and at least three district courts, have taken contrary (and, petitioner submits, correct) positions.[3] This fundamental disarray in the lower courts will, of course, multiply unless this Court clarifies the constitutional parameters, and this case presents a compelling vehicle in which to do so.

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[3] Powell v. Ward, 542 F. 2d 101 (2d Cir. 1976); Mawhinney v. Henderson, 542 F. 2d 1 (2d Cir. 1976); Cook v. Brockway, 424 F. Supp. 1046 (N.D. Texas 1977); Sites v. McKenzie, 423 F. Supp. 1190 (N.D. W. Va. 1976); Lavine v. Wright, 423 F. Supp. 357 (C.D. Utah 1976). See also, albeit pre-Meachum, Powell v. Ward, 392 F. Supp. 628 (S.D. N.Y. 1975), modified, post-Meachum, 542 F. 2d 101 (2d Cir. 1976), supra.

In Montanye v. Haymes, 427 U.S. 236, 242 (1976), the Court described its Meachum holding thusly: "We held in Meachum v. Fano, that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." Since the Court had held in Meachum that Massachusetts law permitted prisoner transfers "for no reason at all," the lower court here held that to be dispositive: that the transfer provided, in essence, a constitutional prophylactic -- that the court would not look beyond the transfer to determine if the petitioner had been unconstitutionally put into solitary at the transferee prison — because this was "a transfer ase." Even if petitioner had no rights or expectations "rooted in state law"

(which petitioner controverts, see pages 24 - 27, infra) he maintains that that absence here is not the sine qua non to relief, because the Constitution itself requires that at least he cannot be put into solitary without affording him some Due Process protections. Meachum, correctly interpreted, did not make prisoners wholly dependent upon the vagaries of state law as the only triggers to some constitutional Due Process. Some hard core of fundamental "liberty interests" are "rooted" in the Constitution itself, and wherever that line may come to be drawn, petitioner maintains that a prisoner has a constitutional right not to be put in solitary "for no reason at all." Meachum is not to the contrary. The "transfers" it addressed were only changes in geographical confinement, not the "major change in the conditions of confinement"[4] surely worked by a "transfer" to solitary. State law

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[4]Wolff v. McDonnell, 418 U. S. 539, 571, n. 19 (1974).

was not intended to envelop every prisoner's right. Justices Stevens, Brennan, and Marshall, dissenting in Meachum, at 235 well recognized this in expostulating that physical transfers should also be entitled to constitutional protection:

> "...On the other hand, I am unable to identify a principled basis for differentiating between a transfer from the general prison population to solitary confinement and a transfer involving equally disparate conditions between one physical facility and another."

The former was, of course, entitled to Due Process protections (this case); the latter was the Meachum case. As noted above (cases in footnote 3, page 11, supra), the Second Circuit and three District Courts have correctly so interpreted Meachum in the light of the Court's earlier cases, but the First, Fourth and Fifth Circuits misapprehend (cases set out in footnote 2, page 10, supra).

That solitary confinement is Constitutionally protected, whatever state law may or may not provide, should be clear from the watershed

of Wolff v. McDonnell, 418 U.S. 539, 555-556 (1974), where Mr. Justice White for the Court said, with no allusion to the provisions of state law eventually held determinative therein, that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country....They may not be deprived of life, liberty, or property without due process of law. Haines v. Kerner, 404 U.S. 519 (1972)...." Specifically reaffirming that part of Wolff, Mr. Justice White, again, for the Court noted in Meachum, at 225, with no reference to state law, "that the convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison. He retains a variety of important rights that the courts must be alert to protect." Haines v. Kerner, supra, cited in Wolff, also said nothing about state-created rights: the Federal Civil Rights Act "complaint was premised on alleged action of prison officials placing him in solitary confinement as a disciplinary measure,..." in violation of his rights to Due Process, and it was held to state a valid

cause of action. A pure-bred "red cow case." Just as clear is Baxter v. Palmigiano, 425 U.S. 308 (1976), where, again not mentioning any state law nexus, the Court noted: "None of the named plaintiffs in No. 74-1194 was subject solely to loss of privileges; all were brought before prison disciplinary hearings for allegations of the type of 'serious misconduct,'... that we held in Wolff to trigger procedures therein."[5] Without rights "rooted in state law" it is clear since Meachum that no prisoner may complain of his transfer without status change to another prison, but it should be equally clear that rights "rooted" in the Constitution protect him from solitary con-

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[5] The infraction of remaining plaintiff in Baxter, ps. 310-311, "could have also led to state criminal proceedings," and after the hearings "he was assigned to 'segregation.'" All of these petitioner's charges were actually referred to the District Attorney for prosecution, and he was, of course, in solitary, before and after his hearings, and the Disciplinary Board recommended "isolation."

finement, (it, of course, takes a "transfer" to get him there) unless he is afforded the limited Due Process procedures specified by the Court in Wolff. The lower court here erred in ruling that since Meachum state law has occupied the field, (footnote, * , pages 32-33, infra) and this Court should now make that clear before other courts are infected with the same error.

While the court below recognized the fact of petitioner's solitary confinement,[6] it simply ignored the reality of that substantial change in his status of confinement:

> "... He argues, for example, that enforced isolation meets the 'liberty interest' test. We note, however, that the hearings led, not to isolation, but to a suspended sentence. The period of suspension has

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[6] "...On September 16, 1975, plaintiff was transferred without warning to a segregation unit ('ten block') in the Walpole prison." Appendix A, page 31, infra.

> has now expired without incident. The disciplinary hearings, in short, have not impinged on plaintiff's interest in avoiding isolation." Appendix A, page 33, infra.

The Court did not indicate, even to use quotation marks around "isolation" in the second sentence, but "isolation" in Massachusetts corrections law is "a term of art." There are a few cells at Walpole, used for disciplinary purposes, which are even more solitary than Ten Block. A restrained description of how solitary and confining the conditions in Ten Block are, may be found in Daigle v. Hall, 387 F. Supp. 652 (Mass. 1975). The lower court seemingly felt that Ten Block was not "solitary" enough, as a matter of constitutional law; that Due Process was required (maybe) before "isolation" in Massachusetts, but Ten Block awaited any prisoner "for no reason at all." That is a cruel joke, not constitutional law. A reading of Daigle v. Hall, supra, should easily demonstrate that whatever may come to be meant by "solitary confinement," any prisoner in "general population" would have a very keen "interest" in

not being so confined--that in any sense of the human condition, it is an interest in "liberty"--and as such, an interest conferring on the prisoner some limited Due Process Clause protections. It is at least as important as "the liberty interest in reputation," which the Court has held protected by the Due Process Clause. Goss v. Lopez, 419 U.S. 565, 576 (1975).

This Court has not constitutionally defined "solitary confinement," but in Wolff, page 571, it was equated to "a major change in the conditions of confinement." It is clearly not "a term of art," however, for in the Wolff opinion the Court also uses interchangeably: "confinement in a disciplinary cell" (page 547), "a dry cell" (Page 552), and "disciplinary confinement" (pages 557 and 571). Always speaking of "solitary confinement or conditions similar to it,"[7] other courts have used other

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[7] Hodges v. Klein, 421 F. Supp. 1224 (N.J. 1976).

words: "maximum security,"[8] "segregation, "[9] "punative segregation,"[10] "a segregation cell,"[11] or "segregated confinement."[12] In some cases the descriptive word was the one used at the prison in question, and sometimes the word was

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[8] Franklin v. Fortner, 541 F. 2d 494 (5th Cir. 1976); Cooper v. Riddle, 540 F. 2d 731 (4th Cir. 1976); Breedon v. Jackson, 457 F. 2d 578 (4th Cir. 1972).

[9] Smith v. Fenton, 424 F. Supp. 792 (E.D. Ill. 1976).

[10] Mawhinney v. Henderson, 542 F. 2d 1, 2 (2d Cir. 1976).

[11] Cook v. Brockway, 424 F. Supp. 1046 (N.D. Texas 1977).

[12] Sweet v. South Carolina Department of Corrections, 529 F. 2d 854 (4th Cir. 1975); Ford v. Board of Managers of New Jersey State Prison, 407 F. 2d 937 (3d Cir. 1969).

the court's own selection, but for constitutional purposes they were all talking about the same thing. It may develop that the exact kind of confinement which triggers Due Process protections becomes semantically difficult -- another one of those things you know when you see it -- but for now this petitioner asks that an easy line be drawn: Ten Block is "solitary confinement" for constitutional purposes, and he could not be put there "for no reason at all".

One comment in the lower court's opinion might be thought to blunt the relevance of this constitutional issue. The court said that Meachum "leaves plaintiff's case in shreds, for the heart of his claim was the illegality of his transfer." (Appendix A, page 33, infra) As the complaint was brought before Fano v. Meachum, supra, was reversed, the petitioner did allege that his move to Walpole was itself unconstitutional, as a matter of chronology, but he also alleged that his Ten Block confinement and his Disciplinary Board hearings deprived him of constitutional rights. Lest the Court be troubled that the clean constitutional issue may not be reached because of a fuzzy question of inept pleading, the easiest proof that the Court of Appeals' characterization of the complaint is simply wrong, is the District Court opinion here.

That court specifically noted that the petitioner alleged unconstitutionality both as to his Ten Block confinement and the Disciplinary Board hearings, ruled the latter were unconstitutional and ordered his release from Ten Block, and did "not address the issue" of the illegality of his transfer from Bridgewater. (Appendix B, pages 38-39, infra).[13] The Court of Appeals' comment is susceptible of another, yet equally erroneous, meaning: that rather than referring to the allegations of the complaint, it meant that since petitioner's solitary confinement perforce necessitated a "transfer" from "general population"

[13]The Court below said that the district court "relied on our short-lived authority in Fano v. Meachum, 520 F. 2d 374 (1st Cir. 1975); it held that the plaintiff's transfer must meet standards imposed by the due process clause of the Fourteenth Amendment". (Appendix A, page 31, infra. That is dead wrong. Not only did the district court specifically say that it did "not address the issue" of transfer, it provided relief because the Disciplinary Board hearings did not afford the petitioner due process of law, as the court noted two sentences later.

this was a "transfer case", governed by Meachum. That the court holds that view, applied to almost exactly the same conditions as this case, is spelled out in its opinion in Four Unnamed Inmates of Massachusetts Correctional Institution at Walpole, Mass. v. Hall, _____f. 2d _____ (1st Cir. 1977), No. 76-1554, March 18, 1977. Meachum, of course, does not so hold, as above demonstrated. If the Court intended Meachum's reach to encompass all status transfers, rather than only geographical transfers, it would not have done so sub silentio, requiring the reversal of a dozen prior decisions. It is sheer sophistry to hold that since solitary confinement from general population requires a "transfer", it may be accomplished "for no reason at all", unless there is a right "rooted in state law" -- yet that is the lower court's holding. It must be struck down.

On the issue of the Disciplinary Board hearings, which the district court ruled were unconstitutional, the Court of Appeals held in essence that was moot because the sentences of "isolation" were suspended. (Appendix A, page 33, infra) That cavalier disposition not only ignores the fact that the suspension was, specifically, only because of the lengthy, unconstitutional Ten Block time he had already served, but also ignores

the other results of the illegal hearings. One simple example will suffice: the district court correctly found that Board's findings "serve as a predicate" for the subsequent reclassification hearing; that the "denial of due process in the disciplinary hearings contaminates, therefore, the classification hearing"; and that "[a]ny substantial adverse modification of the conditions of confinement resulting from the classification hearing would obviously result in irreparable injury to the plaintiff." (Appendix B, page 43, infra). So mesmerized by the pervasiveness of the "transfer" issue was the lower court, and so insensitive to the realities, that it simply ignored this wholly separate issue of unconstitutionality, which is viable even if the petitioner's prior solitary confinement had not occurred.

Even if the Court were to determine that petitioner's solitary confinement is not a sufficient "liberty interest" to be afforded Due Process protection by force of the Constitution alone, and that he must demonstrate that some right "rooted in state law" was here violated, petitioner maintains that that Due Process "trigger" is also present.[14] State regulations, en-

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[14]As noted above, this alternative basis

acted pursuant to statute, constitute part of "state law", of course. The Court considered "Nebraska statutes and regulations" in Wolff, in determining the import of "state law", and Meachum spoke of "statute . . . rule or regulation", "specific laws or regulations", and even "state law or practice" in searching for any "roots".[15]

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for constitutional protection was argued in petitioner's First Circuit brief, not addressed in the court's opinion, the oversight urged upon rehearing, and again ignored by the court's denial of rehearing without comment or reason.

[15]Even the First Circuit has no difficulty with the proposition that regulations constitute part of "state law", routinely evaluating them in Four Unnamed and Lombardo, supra, as have other courts in this context. Finley v. Staton, 542 F. 2d 250 (5th Cir. 1976); Lavine v. Wright, 423 F. Supp. 357 (C.D. Utah 1976); Hodges v. Klein, 421 F. Supp. 1224 (N.J. 1976).

The respondent Commissioner had, in accordance with statute, duly promulgated disciplinary regulations which were in force at the times here relevant. (Appendix C, pages 50-56, infra). Under those regulations, the prisoner's "custody prior to the [Disciplinary Board] hearing will normally remain unchanged. He may be placed in prehearing detention only where he is a threat to himself or others." (Page 56, infra). "Under no circumstances" could more than six days go by between the violation serious enough to warrant a Disciplinary Board hearing and the hearing itself. (Pages 55-56, infra). No Massachusetts prisoner could be disciplined in a "major matter", so-called, such as the charges against the petitioner, without a Disciplinary Board hearing (unless "the sanction" is "accepted" by the prisoner, which, of course, did not happen here), and his custody status could not be changed prior to the hearing for more than six days.[16] Massachusetts,

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[16]The regulations then in effect governing the procedures before the Disciplinary Board, generally "track" the limited Due Process procedures specified by the Court in Wolff.

therefore, having interposed these regulations between its prisoners and any disciplinary sanction, including the assurance of no pre-hearing change in status for longer than six days, this petitioner had "some right or justifiable expectation rooted in state law that he [would] not be transferred except for misbehavior or upon the occurance of other specified events" -- at least for no more than six days -- (even if, arguendo, "transfer" means more than geographical change). Montanye v. Haymes, supra, at 242. Note well that these disciplinary regulations are not the reclassification regulations the Court assessed in Meachum, which were the same regulations this lower court also found not to constitute a substantive right in Four Unnamed and Lombardo, supra. In the former case, the District Court judge had ruled the regulations did create a "justifiable expectation", 424 F. Supp. 357 (Mass. 1976). Petitioner has been able to locate only three other decisions addressing this issue, post-Meachum, and all three directly support petitioner's contention, and are, therefore, in conflict with the court below, albeit sub silentio. Lavine v. Wright, 423 F. Supp. 357 (C.D. Utah 1976); Hodges v. Klein, 421 F. Supp. 1224 (N.J. 1976); MacKinnon v. Patterson, ___F. Supp. ___ (S.D. N.Y. 1976), No. 73-

3998, September 13, 1976.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 76-1195.

GORDON O'BRIEN,
Plaintiff, Appellee,

v.

FRANK A. HALL, ETC.,
Defendant, Appellant.

No. 76-1202.

GORDON O'BRIEN,
Plaintiff, Appellant,

v.

FRANK A. HALL, ETC.,
Defendant, Appellee.

APPEALS FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Anthony Julian, Senior District Judge]

Before COFFIN, Chief Judge,
CLARK*, Associate Justice, U.S. Supreme Court (Ret), and CAMPBELL, Circuit Judge.

Daniel F. Featherston for Gordon O'Brien

Lee Carl Bromberg, Special Assistant Attorney General, for Frank A. Hall, etc.

December 29, 1976

*Sitting by designation.

COFFIN, Chief Judge. Plaintiff is a Massachusetts prisoner; defendant is the state commissioner of corrections. In 1975, the commissioner became concerned about conditions in the state prison at Bridgewater, Massachusetts. He came to suspect that plaintiff was intimidating inmates and guards alike. When he decided to investigate the prison, the commissioner ordered plaintiff summarily transferred to the state prison at Walpole, Massachusetts. The Walpole prison is generally regarded as a less desirable place to serve time than the prison at Bridgewater. On September 16, 1975, plaintiff was transferred without warning to a segregation unit ("ten block") in the Walpole prison. After a long investigation, plaintiff was charged with several assaults. He responded with this suit, seeking a return to Bridgewater. While this suit was pending, elaborate disciplinary hearings were held on the assault charges in November and December of 1975. Plaintiff was found guilty on four counts and sentenced to isolation for thirty days. He had been in the segregation unit for almost three months at this point. When plaintiff appealed to the commissioner, the sentence was suspended for ninety days because of the time plaintiff had spent in segregation.

This suit, meanwhile, progressed in the district court. After extensive hearings, the district court granted a preliminary injunction in plaintiff's favor. The court relied on our short-lived authority in Fano v. Meachum, 520 F. 2d 374 (1st Cir. 1975); it held that plaintiff's transfer must meet standards imposed by the due process clause of the Fourteenth Amendment. The commissioner argued that due process was provided by the disciplinary hearings held in

November and December. Scrutinizing the disciplinary hearings through the lens of the due process clause, the court found it likely that plaintiff would prevail on his claim that the hearings were deficient. A few days later, however, the court stayed the injunction pending appeal, and plaintiff has remained in ten block ever since. Both parties appealed, defendant from the injunction and plaintiff from limitations on its scope.

Weeks after these developments, our decision in Fano v. Meachum, supra, was reversed by the Supreme Court in Meachum v. Fano, 44 U.S.L.W. 5053 (U.S. June 25, 1976). Meachum drastically changed the climate for prisoners' due process claims. Now these claims must withstand a strict preliminary test: the prisoner must show that he has been deprived of a "liberty interest" at the hands of the state. And, in this corner of due process at least, "liberty" is largely defined by state law and by the specific guarantees of the federal constitution. Thus if under state law, a prisoner may be deprived of some interest only because of serious misconduct or some other specified event, that interest becomes part of the liberty protected by the due process clause. Meachum v. Fano, supra, 44 U.S.L.W. at 5057.

Under Massachusetts law, a transfer from one prison to another does not give rise to due process rights, so long as the transfer does not infringe other constitutional rights or violate the terms of the original sentence.* Meachum v. Fano, supra.

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*Plaintiff seems to argue that a transfer may be protected by the constitution independent of state law if the transfer implicates an interest of "real substance", citing Wolff v. McDonnell, 418 U.S. 539, 557 (1974). This reading of Wolff cannot survive the statement in Meachum v. Fano, supra, that "[t]he liberty interest protected in Wolff had its roots in state law". 44 U.S.L.W. at 5057.

This holding leaves plaintiff's case in shreds, for the heart of his claim was the illegality of his transfer. To shore up his case, plaintiff suggests other interests that were endangered by the disciplinary hearings. He argues, for example, that enforced isloation meets the "liberty interest" test. We note, however, that the hearings led, not to isolation, but to a suspended sentence. The period of suspension has now expired without incident. The disciplinary hearings, in short, have not impinged on plaintiff's interest in avoiding isolation. Plaintiff suggests that "good time" is liberty interest. But he also admits that he was convicted of rape, Mass. Gen. L. Ann. ch. 265, § 22, and under state law rapists are not entitled to "good time". Id. ch. 127, § 129. Finally, the fact that guilty findings will be on plaintiff's record does not by itself implicate a liberty interest. Meachum v. Fano, supra, 44 U.S.L.W. at 5058 n. 8. Plaintiff identifies no other possible liberty interests at stake in this case; since none of his suggestions survive scrutiny, we need not go further. Neither the injunction nor the plaintiff's request for damages can stand after Meachum v. Fano.

The preliminary injunction is vacated, and the case is remanded with instructions to dismiss.

APPENDIX B

UNITED STATES DISTRICT COURT
District of Massachusetts

GORDON O'BRIEN, Plaintiff	:	
	:	CIVIL ACTION
v.	:	NO. 75-4783-J
FRANK A. HALL, in his capacity as Commissioner of Corrections of and for the Commonwealth of Massachusetts, Defendant	:	

ORDER
April 28, 1976

JULIAN, Senior District Judge

A hearing has been held on plaintiff's application for a preliminary injunction contained his amended complaint. Evidence was received over a period of eight trial days. The underlying factual situation is set out in the Court's Order of February 19, 1976 denying the plaintiff's application for a temporary restraining order in large part because:

> "On the present state of the evidence the Court finds that the plaintiff has failed to establish that there is a sub-

> stantial likelihood that he will ultimately prevail in his claim to be transferred back to M. C. I. Bridgewater and returned to his status there prior to his transfer to Walpole."

It is conceded by the defendant that the plaintiff was transferred from the general prisoner population of the BX Unit at M. C. I. Bridgewater to segregation in 'Ten Block' at M. C. I. Walpole on September 16, 1975, without prior notice or hearing. Further, the defendant admits that the transfer resulted in a significant adverse modification of the overall conditions of confinement of the plaintiff. Accordingly, under the holding of Fano v. Meachum, 520 F. 2d 374 (1 Cir. 1975), cert. granted, 44 U. S. L. W. 3339 UU. S. December 8, 1975), the transfer called for the application of those protections provided, under these circumstances, by the Due Process Clause of the Fourteenth Amendment of the Constitution.

The plaintiff's amended complaint prays for the issuance of a preliminary injunction enjoining the defendant "from continuing the confinement of the plaintiff in segregation in 'Ten Block' in M. C. I. Walpole, and directing his transfer forthwith to M. C. I. Bridgewater and a return to his prior status there" or, in the alternative, "to 'general population' status in some other Massachusetts correctional institution", from subsequently transferring the plaintiff to "any status of higher security" without first providing the plaintiff with a constitutionally adequate hearing including certain requested procedures;[1] and

[1] "I. written notice specifically detailing the

from "subsequently inflicting summary physical punishment on the plaintiff."

At the outset it must be noted that the inadequate and unsatisfactory manner in which both counsel presented their evidence at the hearing on the

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charge or basis for his proposed transfer to segregation status is to be delivered to the plaintiff and his counsel of record in this case within a reasonable time prior to a hearing thereon, the time for which shall be specified therein;

"II. the plaintiff is to be afforded the assistance of counsel in preparation for the hearing;

"III. a hearing shall be held on the date specified in the notice, or on a date either party may reasonably have requested it be continued to, before an impartial tribunal consisting of three or more persons to be designated by the Superintendent of such institution, which hearing need not be conducted in accordance with the strict rules of evidence, but the determination of the tribunal shall be based on reliable and substantial facts;

"IV. the plaintiff shall be afforded the right to testify at the hearing, to call witnesses and present evidence on his own behalf, and to cross-examine persons giving testimony against him;

"V. a record shall be made of the hearing, either by a stenographic reporter or a tape recorder or other satisfactory recording device, and such record shall be maintained and made a part of the plaintiff's

preliminary injunction necessitated continual participation by the Court in order to elicit pertinent, clarifying evidence. In particular, counsel for the defendant went forward in a halting and markedly unprepared fashion. He has attempted to remedy this performance by a lengthy recitation of the "facts" in the "Defendant's Memorandum in Lieu of Closing Argument." However, many of the "facts" alluded to were either not presented in evidence at the hearing or were taken from exhibits introduced for a purpose other than the purposes for which the defendant has utilized them in his memorandum.[2]

The grant of a preliminary injunction lies within the sound discretion of the Court. Anheuser-Busch, Inc. v. Teamsters Local No. 633, etc., 511 F. 2d 1097 (1 Cir. 1975), cert. denied, 44 U. S. L. W. 3226 (October 6, 1975). Its purpose is to preserve the status quo pending a determination of the action on

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institutional record, and be made reasonably available to the plaintiff and his counsel prior to the tribunal's final determination; and

"VI. the tribunal shall make written findings of fact upon which its determination of the charges is based, and shall furnish a copy thereof to the plaintiff and his counsel."

[2] For example, information gathered from the investigation conducted after the plaintiff's transfer, and recorded in Exhibit 6, is presented in the defendant's memorandum as if such information had been known to the defendant Commissioner prior to the transfer.

the merits. Owens v. School Committee of Boston, 304 F. Supp. 1327 (D. Mass. 1969). It is a well-settled proposition of law in this Circuit that in order to prevail in its application for a preliminary injunction the plaintiff bears the burden of showing (1) immediate and irreparable injury, (2) a substantial likelihood of success on the merits, and (3) that the harm to the movant outweighs the harm to the opposing party and to the public. Pauls v. Secretary of Air Force, 457 F. 2d 294 (1Cir. 1972); International Ass'n of M. & A. W. v. Northeast Airlines, Inc., 473 F. 2d 549 (1 Cir. 1972), cert. denied, 409 U. S. 845 (1972); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295 (D. Mass. 1975).

We now turn to a consideration of the facts of this case in light of the above-enunciated principles, and bearing in mind that the "power to grant injunctive relief should be used sparingly, cautiously, and only where the necessity for such relief is clear." Plumbers Local No. 519 v. Construction Industry Stabilization Comm., 350 F. Supp. 6 (S. D. Fla. 1972), quoted with approval in Castro v. Beecher, 386 F. Supp. 1281 (D. Mass. 1975).

Findings of fact herein stated are based upon the present state of the evidence and are subject to revision in the light of such additional evidence as may be introduced at the trial on the merits.

The defendant, in order to meet his concessions that the plaintiff was transferred without prior notice and hearing, has asserted that the transfer occurred in the face of exigent circumstances, and that the plaintiff was provided with a hearing satisfying the requisites of the Due Process Clause as soon after the transfer as was possible. The plaintiff disputes these contentions. We do not address

the issue of exigent circumstances in light of our finding below with respect to the disciplinary hearings which were provided the plaintiff subsequent to his transfer.

The plaintiff attacks the adequacy of the disciplinary protections afforded him at hearings held by the Department of Corrections on November 14, November 26, December 1, December 3, and December 10 of 1975, for their alleged failure to comply with the mandate of the Due Process Clause in several respects. The Court finds that there is a substantial likelihood that the plaintiff may prevail at a trial on the merits in his claim that the presence of counsel for the defendant Commissioner during the deliberations of the Disciplinary Board, pertaining to the guilt or innocence of the plaintiff on the charges alleged against him in the disciplinary reports, violated the plaintiff's due process rights.

On November 17, 1975, United States Magistrate Davis issued an order recognizing the plaintiff's handwritten letter dated November 6, 1975, as a complaint alleging a violation of 42 U. S. C. § 1983 by the defendant. Deliberations of the Disciplinary Board resulting in findings of guilty as to four disciplinary reports, were held on December 1, December 3, and December 10, 1975. Counsel for the defendant Commissioner appears to have participated in all deliberations.

In Daigle v. Hall, 387 F. Supp. 652 (D. C. Mass. 1975), the Court sets forth the minimum procedural protections required by the Due Process Clause at prison hearings such as the ones involved in this case. One such protection is the right to an impartial tribunal. The Court notes:

> "Practical necessity requires that the hearing tribunal will ordinarily be made up of prison staff with prior knowledge of the inmate and some general interest in the outcome. The requirement of impartiality requires, at the very least, however, that the tribunal not include the accusing officer." (Emphasis added.) 387 F. Supp. at 660.

While counsel for the defendant Commissioner did not act as an accusing officer at the disciplinary hearings, it is clear that as an attorney representing the Commissioner in a suit challenging his authority to transfer the plaintiff, counsel had more than "some general interest in the outcome".

The defendant has repeatedly argued that the chief purpose of the transfer was to allow the Commissioner to cause a thorough investigation of the plaintiff's behavior at Bridgewater in order to determine whether there was a factual basis for the issuance of disciplinary reports. The reports, if any were filed, would be acted upon by a Disciplinary Board whose findings would, in turn, provide the basis for a classification decision. Since the result of the disciplinary hearings would have a direct impact upon the plaintiff's status and upon the extent to which the plaintiff's transfer could be viewed as having been justified, counsel for the defendant had an obvious interest in the outcome of the disciplinary hearings. Consequently, defendant's counsel was placed in a position where he or she would have have been acting in two conflicting roles during the Disciplinary Board deliberations concerning the plaintiff's guilt or innocence, namely, his or her

role as an attorney advising the Disciplinary Board on legal questions, and his or her role as an advocate for the defendant Commissioner in a suit already initiated by the plaintiff and inextricably cound up with the proceedings before the Disciplinary Board.

The defendant argues that counsel's role at the disciplinary hearings was limited to providing legal advice regarding procedural matters to the lay Board members. We would find no fault with counsel's actions were his or her role to have been confined to giving such legal advice. We are concerned not with the advisory role counsel played during the presentation of the case against the plaintiff, but the nature and extent of their participation in the Disciplinary Board's deliberations concerning the guilt or innocence of the plaintiff, for it is at that juncture that the plaintiff's right to an impartial tribunal comes into play. We are unable, however, to determine what role counsel played during the Board determinations, as there is no stengraphic transcript of that portion of the disciplinary proceedings and no evidence on that issue was presented at the hearing. Moreover, it would seem too clear for argument that a fair hearing presupposes an impartial tribunal and that participation by an advocate at the tribunal's adjudicatory deliberations renders impartiality most difficult, if not impossible, to maintain.

Indeed, the Supreme Court has held that the right to an impartial tribunal is so basic a requirement of due process, that even the probability of bias in a decision maker must be avoided. In Re Murchison, 349 U. S. 133 (1955). In that case the Court, in holding that a state judge, serving as a "one-man grand

jury" under Michigan law in the investigation of crime, violated the Due Process Clause when he convicted, and sentenced for contempt, two witnesses who, in appearing before him, had refused to answer questions propounded by him, noted:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appear-

> ance of justice.' Offutt v. United States, 348 U.S. 11, 14."

349 U.S. at 136.

Since we do not know, on the present state of the evidence, what function counsel for the defendant performed during the closed-door deliberations of the Disciplinary Board, and since their presence during the deliberations may have impaired the impartiality of the Board, the Court holds that the plaintiff has borne his burden of showing a substantial likelihood that he may prevail on the merits in so far as his due process claim to an impartial tribunal is concerned.

The defendant argues that this defect in the disciplinary hearings, if indeed it was a defect, has been cured by the subsequent classification hearing held on March 29, 1976. The Court does not agree. The defendant admits that the Board's findings on the disciplinary reports serve as a predicate to the classification hearing. A denial of due process in the disciplinary hearings contaminates, therefore, the classification hearing held thereafter. See King v. Higgins, 495 F. 2d 815 (1 Cir. 1974) (per curiam). Any substantial adverse modification of the conditions of confinement resulting from the classification hearing would obviously result in irreparable injury to the plaintiff.

For similar reasons the Court finds that there is a substantial likelihood that the plaintiff may prevail at a trial on the merits in a claim that the defendant Commissioner should not have been the reviewing authority for the plaintiff's appeals from the Disciplinary Board's findings of guilty on four of the disciplinary reports. Where the Commission-

er was the defendant in this case, and where a hearing on the issue of possible violations of the plaintiff's due process rights during the disciplinary process was being held at the very time the Commissioner undertook to act on the appeals, it is apparent that a substantial question is raised as to the validity of the appeal due to a denial of the plaintiff's right to an impartial appellate review. The Court does not, contrary to the plaintiff's argument, find any due process violation in the Commissioner's actions in transferring appellate authority from Superintendent Gaughan, but rather in the Commissioner's assuming that authority for himself. Indeed, on the basis of the evidence thus far introduced, the Court finds that the Commissioner was fully justified in relieving Superintendent Gaughan of those appellate duties conferred by Section V(8) of Department Order 4310.1 "[P]rison officials may be justified in ignoring even emergency regulations if they are unworkable in the circumstances." Carlo v. Gunter, 520 F. 2d 1293, 1296, n. 5 (1 Cir. 1975). As the Court's findings below indicate, the Commissioner could have reasonably concluded that Gaughan would not have stood impartial in this matter.

The contentions raised by the plaintiff with respect to alleged violations of his due process rights to call witnesses in his own defense, and to confront and cross-examine those furnishing evidence against him, are without merit. See Baxter v. Palmigiano, 44 U.S.L.W. 4487 (U.S. April 20, 1976). The remaining contentions concerning procedural defects violating the plaintiff's due process rights, allegedly occurring during the disciplinary hearings, are likewise without merit.

As noted earlier, the Court must consider, in addition to the issues of substantial likelihood of success on the merits, and immediate irreparable injury, the public interest as well as a balancing of the equities, in granting a preliminary injunction. The evidence presently before this Court provides an ample basis for concluding that the return of the plaintiff in any capacity to M.C.I. Bridgewater would constitute an undue threat of harm to the plaintiff, to other members of the prisoner population at Bridgewater, and to the maintenance of security at the institution.[3]

More particularly, on the evidence presently before it, the Court makes the following findings: During the plaintiff's incarceration at Bridgewater, a strong-arm group of prisoners developed, headed by inmates Robert Glavin and the plaintiff.[4]

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[3] We have relied especially upon that evidence produced at the disciplinary hearings, including confidential exhibits preserved in Exhibit 6, as well as other evidence contained in Exhibit 6.

[4] Glavin was serving a life sentence for murder. However, according to the testimony of the Superintendent of Bridgewater, Charles Gaughan, Glavin escaped from Bridgewater approximately two weeks after the plaintiff's transfer and is still at large. The plaintiff is serving a sentence of 40-50 years for rape and certain other related crimes of violence. The plaintiff is 31 years old, 6 feet 4 inches tall, weighs approximately 230 pounds, is very strong and is of a heavy build.

Glavin, in his capacity as the "front office runner," met daily with the Superintendent of Bridgewater, Charles Gaughan, and was used by Superintendent Gaughan as a source of information as to prisoner activities within Bridgewater.[5] Additionally, the plaintiff and Glavin were the leaders of an inmate committee, the "Resident Committee on Individual Responsibility," which was used by Gaughan to police inmate activities in the BX Unit. As a result of their membership on the Committee, their close relationship with the Superintendent, Gaughan's substantial reliance upon their opinions, and their abilities to maintain an appearance of control within the BX Unit, Glavin, the plaintiff, and their inmate associates achieved a position of dominance whereby they could, and did, intimidate prisoners and corrections officers alike in order to acquire favored treatment for themselves. Both Glavin and the plaintiff exploited their positions to the point where they had virtual access to all parts of the institution at will; where they were able to protect themselves from the normal operation of the prison disciplinary process by intimidating corrections officers and exercising their influence with Gaughan;

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[5] In a report of an interview with Gaughan on December 9, 1975, written by James D. Hoard and Joseph Olson, investigators of the Security Management Team of the Department of Corrections, Gaughan is reported as having stated that he relied heavily upon Glavin in his capacity as an informer. He further stated that is was his opinion that Glavin used the plaintiff as his bodyguard.

and where they were thereby left free to intimate and assault their fellow prisoners. As a consequence of the existence of this strong-arm group, disciplinary control at Bridgewater was weakened and staff morale sank to a dangerously low level.

To summarize, we find exignet circumstances did exist which would have justified the action of the defendant in removing the plaintiff without prior notice or hearing so that a thorough investigation into the activities of the plaintiff, the inmate committee, and the operation of the BX Unit at Bridgewater might be effectively conducted. The Court leaves open, however, the following issues until further evidence and argument may be introduced at the trial on the merits: Whether the defendant, or his aides upon whose recommendations he relied, possessed sufficient knowledge of the above facts at the time of the plaintiff's transfer to justify a claim of exigent circumstances; and whether personal knowledge of these facts is legally required of the defendant, as opposed to his subordinates.

It would be an act of gross negligence for this Court to return the plaintiff to Bridgewater in the face of these findings. Accordingly, the Court, in responding to its duty to weigh the equities of the' parties and to consider the public welfare, denies the plaintiff's prayer for an injunction directing his return to his prior status at Bridgewater.[6]

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[6] "The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff . . .[The Court] will avoid . . . injury so far as may be, by

"Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian Ry. Co. Systems Federation, 300 U. S. 515, 552 (1936).

On the other hand, the Commissioner of Corrections testified at the hearing on the preliminary injunction that conditions of confinement at Massachusetts county houses of correction substantially approximated the conditions of confinement of the general population of the BX Unit at M. C. I. Bridgewater, and that generally such institutions have security capabilities which would be adequate for purposes of safely confining the plaintiff. On the basis of this testimony, the Court finds that, pending final determination on the merits, it would be possible, and practicable, for the plaintiff to be confined in a correctional institution other than M. C. I.

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attaching conditions to the award . . ." Yakus v. United States, 321 U. S. 414, 440 (1944). "[I]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all . . . whose interests the injunction may affect." Inland Steel Co. v. United States, 306 U. S. 153, 157 (1939).

Bridgewater, in which conditions of confinement would be substantially the same as those provided for the general inmate population at M. C. I. Bridgewater.

Plaintiff's request for other preliminary relief is denied, since none is warranted by the evidence.

Accordingly, it is hereby ordered that the defendant cause the plaintiff to be transferred without unnecessary delay from M. C. I. Walpole to a Massachusetts correctional institution other than M. C. I. Bridgewater, there to be imprisoned under conditions of confinement substantially the same as those provided for the general inmate population at M. C. I. Bridgewater until further order of the Court.

(signed) Anthony Julian
U. S. Senior District Judge

APPENDIX C

Massachusetts Prison Disciplinary Regulations
D.O. 4310.1, Disciplinary Process -
Rules and Regulations
(relevant parts)

The Commonwealth of Massachusetts

Department of Correction

Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston 02202

May 16, 1975

Frank A. Hall
Commissioner

The Honorable Paul H. Guzzi
Secretary of the Commonwealth
State House
Boston, MA 02133

RE: D.O. 4310.1 Disciplinary Process

Dear Sir:

The Commissioner of Correction on May 16, 1975 approved D.O. 4310.1, Disciplinary Process--Rules and Regulations under authority of G.L. c. 124, §§

1 (b), (i), and (q) and chapter 127, § 33. Notice was published in newspapers on March 26 and 31, 1975 regarding the regulations pursuant to G.L. c. 30A, § 3. A copy of the Disciplinary Process--Rules and Regulations is attached for filing in your office in accordance with G.L. c. 30, § 37.

These regulations set forth previous departmental procedures for conducting disciplinary proceedings against residents and reflect recent judicial rulings which impose additional standards to be followed by the Department in such proceedings. Also, written comments regarding these regulations have been received since the publication of the notice in newspapers, and numerous conversations with persons in the department and members of the public have indicated that the following revisions are necessary. . ."

* * * *

DISCIPLINARY POLICY

PURPOSE:

The disciplinary process is one of the most important elements of the correctional system because it affects the very lives, well-being, and attitudes of both residents and staff. These rules are promulgated in the belief that a speedy and fair adjudication of alleged wrong-doing coupled with meaningful sanctions contributes to the maintenance of security and the rehabilitation of the resident.

OVERALL SYSTEM:

These rules establish a hearing examiner system for minor violations where a trained impartial individual (designated as the disciplinary officer) investigates the circumstances, makes a finding of fact, and recommends a sanction(s) where appropriate within 24 hours of the alleged violation. If the finding is adverse to the resident, he will have the option of accepting the finding and sanction, or of appealing the finding and/or sanction to a three man disciplinary board. Major violations will be certified to the disciplinary board for a formal hearing where the resident may have the benefit of representation, confrontation, and cross-examination. The action of the board may be appealed to the superintendent and certain sanctions may be appealed to the Commissioner of Correction.

The rules and regulations encompass both the following boldfaced type and the lower case narrative.

* * * *

II. REPORTING OF ALLEGED VIOLATIONS

A. EXCEPT FOR THOSE SITUATIONS WHERE ONLY SLIGHT SUMMARY PUNISHMENT SHOULD BE IMPOSED, ANY EMPLOYEE WHO OBSERVES OR HAS RECEIVED REPORT OF AN APPARENT VIOLATION BY A RESIDENT AFTER TAKING APPROPRIATE SECURITY MEASURES SHALL MAKE A SUFFICIENT INVESTIGATION SO THAT HE IS CERTAIN OF THE AVAILABLE FACTS. HE SHOULD IMMEDIATELY NOTIFY THE SHIFT SUPERVISOR AND COMPLETE A DISCIPLINARY REPORT.

These rules in no way preclude or discourage the present practice of the informal handling of very minor violations where an officer or supervisor issues a warning or otherwise disposes of the matter short of a formal sanction and disciplinary report.

B. THE SHIFT SUPERVISOR WILL REVIEW THE DISCIPLINARY REPORT FOR COMPLETENESS, ACCURACY, AND POSSIBLE MITIGATING CIRCUMSTANCES AND SUPPLEMENT THE REPORT WITH ANY PERTINENT DATA.

The supervisor has the authority to dismiss or revise a charge and/or handle the matter informally. He also makes the decision as to the resident's pre-hearing status pending consultation with the disciplinary officer.

C. THE DISCIPLINARY REPORT WILL THEN BE FORWARDED TO THE DISCIPLINARY OFFICER. A COPY OF THE REPORT SHALL BE FURNISHED TO THE RESIDENT.

The disciplinary officer has the responsibility of serving the resident with both a notice of charges and a copy of the disciplinary report as soon as practicable. Alleged violations will be investigated by the disciplinary officer unless he certifies the matter directly to the board for a formal hearing. Those matters certified directly to the board for a formal hearing are designated major matters while those retained by the disciplinary officer for his consideration are designated minor matters. Where the shift super-

visor has placed the resident in pre-hearing detention, the disciplinary officer will consult with the shift supervisor concerning the resident's prehearing status.

III. PROCEEDINGS BEFORE THE DISCIPLINARY OFFICER

A. UPON RECEIPT OF THE DISCIPLINARY REPORT THE DISCIPLINARY OFFICER WILL FIRST DETERMINE WHETHER TO CERTIFY THE MATTER TO THE DISCIPLINARY BOARD FOR A FORMAL HEARING AS A MAJOR MATTER. WHERE THE DISCIPLINARY OFFICER DESIGNATES THE CASE AS A MINOR MATTER HE WILL CONDUCT AN INDEPENDENT INVESTIGATION AND MAKE A FINDING OF FACT WHICH SHALL SPECIFY: NOT INVOLVED; INSUFFICIENT FACTS TO JUSTIFY DISCIPLINARY ACTION; OR GUILTY OF A SPECIFIC VIOLATION OR VIOLATIONS. A RECOMMENDED SANCTION SHALL ACCOMPANY A FINDING OF GUILTY.

In every case to be considered on the merits by the disciplinary officer he will interview the resident after first serving him with a notice of charges and a copy of the disciplinary report. Where the resident contests the allegations, the disciplinary officer shall interview the reporting officer and others witnessing the events. The findings of fact will be based upon reliable evidence. Sanctions shall be recommended in light of both the offense and the offender.

B. THE FINDINGS AND RECOMMENDED SANCTION OR SANCTIONS SHALL BE IN WRITING AND PRESENTED TO THE RESIDENT WHO MAY ELECT TO ACCEPT THE FINDING AND/OR SANCTION, OR MAY APPEAL EITHER OR BOTH TO THE DISCIPLINARY BOARD.

The disciplinary officer or his representative shall normally present the finding and recommended sanction in person to the resident within 24 hours of the events, at which time he may discuss the events and options with the resident and shall advise the resident of his appellate remedy and supply him with the requisite form. In the special circumstances where the investigation cannot be completed within 24 hours of the events, the resident shall be so informed within the 24 hour period. Under no circumstances will a finding and sanction be presented after 72 hours from the events in question.

C. WHERE THE FINDING AND/OR SANCTION IS APPEALED, THE DISCIPLINARY OFFICER SHALL FORWARD THE DISCIPLINARY REPORT, THE FINDINGS, AND RECOMMENDED SANCTION TO THE DISCIPLINARY BOARD WHICH WILL SCHEDULE A HEARING WITHIN FIVE DAYS.

The resident shall be notified immediately of the scheduled date and time of the hearing and may request a short continuance for good cause.

D. WHERE THE CASE IS CERTIFIED TO THE DISCIPLINARY BOARD AS A MAJOR MATTER, A HEARING SHALL BE SCHEDULED WITHIN THREE

DAYS. A CONTINUANCE FOR A SHORT PERIOD OF TIME MAY BE GRANTED FOR GOOD CAUSE.

Upon receipt of the disciplinary report the disciplinary officer must decide within 24 hours whether the case will be handled as a major matter. Once certified as a major matter the resident will be given notice of the charge and a copy of the disciplinary report. The disciplinary officer may consult the resident or any other person prior to certifying the case to the board for a formal hearing.

* * * *

VI. RESIDENT'S STATUS PENDING HEARING

THE RESIDENT'S CUSTODY PRIOR TO THE HEARING WILL NORMALLY REMAIN UNCHANGED. HE MAY BE PLACED IN PRE-HEARING DETENTION ONLY WHERE HE IS A THREAT TO HIMSELF OR OTHERS.

In reviewing the disciplinary report the shift supervisor makes the initial determination on the resident's pre-hearing status. Where the resident is placed in detention the disciplinary officer, upon receipt of the disciplinary report, shall consult with the supervisor concerning the resident's pre-hearing status.

Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1453

GORDON O'BRIEN,
PETITIONER,

v.

FRANK A. HALL,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT FRANK A. HALL IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1453

GORDON O'BRIEN,
PETITIONER,

v.

FRANK A. HALL,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENT FRANK A. HALL IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, dated December 29, 1976, was ordered by the Court to be "Not For Publication," but is set out as Appendix A to the Petition, pages 27-33. The opinion of

the United States District Court for the District of Massachusetts, dated April 28, 1976, which was reversed by the Court of Appeals, is set out as Appendix B to the Petition, pages 34-49. It too will not be reported, in accordance with Appendix B of the Rules of the United States Court of Appeals for the First Circuit.

Jurisdiction

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). The judgment of the court below was entered on December 29, 1976, and a Petition for a Rehearing was denied on January 20, 1977. The petition was filed on April 20, 1977. By order of the Clerk of this Court dated May 24, 1977, the time for filing this Brief in Opposition was extended to and including June 22, 1977.

Questions Presented

1. Does a state prisoner's contention that the Due Process Clause of the Fourteenth Amendment to the United States Constitution, without reference to state law, gives him a "liberty" interest which entitles him to due process protections upon his transfer to higher custody status in a non-disciplinary segregation unit, raise a substantial question of law sufficient to justify certiorari in the aftermath of *Meachum* v. *Fano,* 427 U.S. 215 (1976), and in the absence of any opinion in conflict with the negative conclusion of the Court below?

2. Does a state prisoner's contention that flexible procedural guidelines in state prison disciplinary regulations create a right or justifiable expectation rooted in state law sufficient to invoke the Due Process Clause raise any substantial question of law which would justify certiorari in

the aftermath of *Meachum* v. *Fano,* 427 U.S. 215 (1976), where (a.) all disciplinary penalties ordered after hearings resulted in guilty findings were suspended, and (b.) no opinion can be found which is in conflict with the negative conclusion of the Court below?

Constitutional Provision Involved

Section 1., Fourteenth Amendment, Constitution of the United States of America (in relevant part): ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Statement of the Case

In 1975 respondent Frank A. Hall, the Massachusetts Commissioner of Correction (hereinafter the "Commissioner"), became concerned about conditions at the Massachusetts Correctional Institution — Bridgewater (hereinafter "MCI Bridgewater"). Information which the Commissioner received made him suspect that petitioner Gordon O'Brien (hereinafter "O'Brien"), a prisoner at MCI Bridgewater, had organized and led a strong-arm group of inmates, which assaulted other inmates and which had intimidated inmates and guards alike. On September 16, 1975, O'Brien was summarily transferred without warning from MCI Bridgewater to the Massachusetts Correctional Institution — Walpole (hereinafter "MCI Walpole") on orders of the Commissioner. At MCI Walpole O'Brien was held in Block 10, a segregation unit, in awaiting action status.

Meanwhile the Commissioner ordered a full investigation of MCI Bridgewater. As a result of the investigation, several assault charges were lodged against O'Brien. Elaborate disciplinary hearings were held on the assault charges

on several days in November and December 1975. O'Brien was represented by counsel throughout these administrative proceedings. He was found guilty on four assault charges and a cumulative sentence of thirty days isolation was ordered. However, upon appeal to the Commissioner the penalty was suspended for 90 days, in view of his long stay in segregated confinement. That period having expired without further incident, O'Brien in effect experienced no disciplinary punishment of any kind for his assaultive behavior at MCI Bridgewater.

In Block 10 at MCI Walpole O'Brien's conditions of confinement were substantially more stringent than those he had enjoyed at MCI Bridgewater. Contrary to his repetitious, boot-strap assertion, however, he was not placed in "solitary". (See, e.g., O'Brien's Petition, pp. 3, 5, 6, 8, 9, 13, 14, 18, 19, 23, 24.) Rather, he was held in awaiting action status in Block 10, segregated from the rest of the prison population. The Commissioner concedes that O'Brien had a materially adverse change in the conditions of his confinement and that he was held in strict security, but that is far different from "solitary". During his stay in Block 10 O'Brien has had a fully furnished cell, the opportunity to have a radio and television, reading materials and writing materials. He has enjoyed limited contact with other inmates, adequate ventilation, regular meals, periodic showers, regular visiting periods, a brief daily recreation period and correspondence privileges. He has had access to educational and counselling programs and to religious services. By way of contrast, were he placed in isolation (the Massachusetts term for "solitary" as O'Brien acknowledges, see Petition, pp. 7, 18), he would be required to spend his time in a minimally furnished cell without radio or television and with limited reading matter. The closed solid door of the isolation cell would preclude contact with others, even in the corridor. He would have no

visits, no access to a shower outside his cell, no recreational time outside his cell and no contact with educational or counselling programs. He could be kept in these isolated conditions, essentially without contact with the rest of the prison or the world outside, for a maximum of 15 days for any one offense. Massachusetts General Laws, c. 127, § 40. This is "solitary", referred to in Massachusetts as isolation. Yet O'Brien has not served any isolation time at all since his transfer; the Commissioner suspended O'Brien's 30 day isolation penalty in view of his long stay in awaiting action status, and since the 90 day suspension period passed without incident, O'Brien effectively faced no disciplinary punishment at all for the assaults he committed on other inmates.

Moreover, O'Brien remained in Block 10 by his own choice after February 20, 1976, when the Commissioner offered to move him to a far less restrictive general population housing area in MCI Walpole. O'Brien declined, apparently out of concern for his own safety. He has since been rehoused in Block 9, a unit less restrictive than Block 10, where contact with other inmates is limited to small groups of pre-screened prisoners.

After disciplinary proceedings were underway, O'Brien wrote a letter to the United States District Court for the District of Massachusetts. The District Court treated the letter as a Federal Civil Rights Act complaint, filed it, and this action commenced. In his complaint (as subsequently amended by counsel), O'Brien challenged his transfer to higher custody status at MCI Walpole as a violation of his due process rights. Relying on the opinion of the First Circuit Court of Appeals in *Fano* v. *Meachum*, 520 F.2d 374 (1975), *rev'd sub nom. Meachum* v. *Fano*, 427 U.S. 215 (1976), the District Court scrutinized the disciplinary hearings afforded to O'Brien to see if they met due process standards required by that case on transfer to

higher custody status. The District Court believed it found two due process defects in the hearings and granted preliminary injunctive relief on that basis. The Commissioner appealed and on his request, the District Court stayed its order. During the pendency of the appeal this Court issued its opinion in *Meachum* v. *Fano,* 427 U.S. 215 (1976), which removed the foundation of O'Brien's case. The First Circuit applied the *Meachum* holding to the facts of the instant controversy, concluded that "[n]either the injunction nor the plaintiff's request for damages can stand after *Meachum* v. *Fano*" (Appendix A to Petition, p. 33), and remanded to the District Court with instructions to dismiss.

In his Petition for a Writ of Certiorari, O'Brien attempts to salvage his case by asserting that alleged due process defects in his disciplinary hearings, held subsequent to his transfer to higher custody status in a segregation unit, may be raised on the strength of his "liberty" interest in avoiding segregated confinement, even though no disciplinary punishment was subsequently imposed after the guilty findings. That claim was laid to rest in unequivocal terms by this Court's holding in the *Meachum* case.

Reasons for Denying the Writ

I. The Petitioner Has Shown No Conflicts in Court Decisions Which Would Justify a Grant of Certiorari.

No "conflict" has been presented by petitioner O'Brien save that between his own position as stated in his Petition (pp. 9-23) and the holdings of this Court in *Meachum* v. *Fano,* 427 U.S. 215 (1976) and *Montanye* v. *Haymes,* 427 U.S. 236 (1976), which were scrupulously applied to the facts of the instant case by the court below (See Appendix A to Petition, pp. 30-33). Petitioner asserts that his own transfer to higher custody status in a segregation unit

implies "[s]ome hard core of fundamental 'liberty interests' [which] are 'rooted' in the Constitution itself" (Petition, p. 13), and thus that due process rights attach. However, this is precisely the proposition that this Court laid to rest in *Meachum,* where it held that the due process clause does not

> ". . . in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the state's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules."

427 U.S. at 225. Unduly severe conditions of confinement may, of course, give rise to a valid claim of constitutional deprivation independent of the Due Process Clause — e.g., the Eighth Amendment. Since the decision in *Meachum,* three Circuits have followed its mandate and rejected due process claims predicated upon transfers where prisoners could demonstrate no "right or justifiable expectation rooted in state law . . . not [to] be transferred except for misbehavior or upon the occurrence of other specified events." *Montanye* v. *Haymes, supra,* 427 U.S. at 242. *See Four Certain Unnamed Inmates v. Hall,* 550 F.2d 1291 (1st Cir. 1977); *Lombardo* v. *Meachum,* 548 F.2d 13 (1st Cir. 1977); *Franklin* v. *Fortner,* 541 F.2d 494 (5th Cir. 1976); *Cooper* v. *Riddle,* 540 F.2d 731 (4th Cir. 1976).

No conflicting decisions can be found. *Powell* v. *Ward,* 542 F.2d 101 (2nd Cir. 1976), cited by Petitioner (Petition,

p. 11, n. 3), is not to the contrary. That case, decided less than three months after the *Meachum* decision, involved the successful appeal by prison administrators of provisions of a pre-*Meachum* District Court injunction regarded by them as too limiting. The Second Circuit simply granted the prison administrators the full measure of relief requested without reference to the principles of due process analysis announced in *Meachum*. In *Mawhinney* v. *Henderson*, 542 F.2d 1 (2nd Cir. 1976), a case decided less than two months after this Court's decision in *Meachum*, the Second Circuit found several claims stated by a prisoner placed in disciplinary solitary confinement, including one alleging violation of due process. The Circuit Court did not mention the *Meachum or Montanye* decisions, and simply stated, as to the due process claims, that remand was required for "a fuller development of the record", 542 F.2d at 4. *Mawhinney* is entirely consistent with *Meachum*, and with the First, Fourth and Fifth Circuit cases noted above, since the prisoner in that case may have had some right rooted in New York state law which triggered due process protections. Alternatively, he may have been able to breathe life into his due process claim at trial on the basis of his other, independent claims of constitutional violation arising from his disciplinary solitary confinement. The three District Court decisions cited by petitioner as raising a conflict are simply irrelevant, since "[t]he Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court." Stern & Gressman, *Supreme Court Practice*, § 4.8, pp. 161-62 (4th ed. 1969). Moreover, none of the decisions presents a genuine conflict. In *Cook* v. *Brockway*, 424 F. Supp. 1046, 1052 (N.D. Texas, 1977), the Court found that "placing of plaintiff in a segregation cell did not deprive him of

any rights to which due process procedures would be applicable." *Sites* v. *McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976), and *Lavine* v. *Wright*, 423 F. Supp. 357 (C.D. Utah, 1976) both involved interpretation of state statutes which provided a source of entitlement as a predicate for due process claims—an element absent in the cases above where no due process right was found.

In short, no decision can be found which conflicts at all with the decision of the First Circuit below. The teaching of *Meachum* and its progeny is clear, and is being consistently applied at the Circuit and District Court levels. There is thus no need for this Court to speak further on these issues, and accordingly, there is no basis here for certiorari.

II. Petitioner Has Presented No Substantial Issue of Law To Justify Review by the Supreme Court.

Petitioner acknowledges that a prisoner may not complain on due process grounds of a "transfer without status change to another prison" absent rights rooted in state law, but argues nonetheless that "rights 'rooted' in the *Constitution* protect him from solitary confinement, (it, of course, takes a 'transfer' to get him there) unless he is afforded the limited Due Process procedures specified by the Court in *Wolff*" (Petition, pp. 16-17). As the First Circuit noted below, "[t]his reading of *Wolff* cannot survive the statement in *Meachum* v. *Fano*, *supra*, that '[t]he liberty interest protected in *Wolff* had its roots in state law.' 44 U.S.L.W. at 5057" (Appendix A to Petition, p. 33, footnote). In any event the issue is insubstantial. This Court has provided all the analytical tools necessary for evaluation of petitioner's due process claim in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), *Meachum*, *Montanye*, and related due

process cases, and need give it no further attention. Moreover, petitioner's claim cannot be evaluated on this record since, as noted above, he never experienced solitary confinement but rather was confined under less severe conditions in a segregation unit. Even though he was found guilty on four disciplinary assault charges, all penalties were suspended and petitioner never served isolation time. Thus he is not in a position to raise the potential claim that Massachusetts statutes create a right not to serve isolation time absent misconduct and thus trigger due process protections. But again, even if this claim could be raised, it is of relatively insignificant dimensions and can easily be evaluated on the basis of the analytical framework already expounded by this Court.

Petitioner's claim that Massachusetts Department of Correction disciplinary regulations create rights rooted in state law and therefore invoke due process protections fares no better. It is again not a significant issue, but one easily resolved on the basis of principles already enunciated by this Court. The First Circuit has already addressed a nearly identical issue in *Four Certain Unnamed Inmates* v. *Hall*, 550 F.2d 1291 (1st Cir. 1977);and *Lombardo* v. *Meachum*, 548 F.2d 13 (1st Cir. 1977); using principles delineated in previous Supreme Court cases. Secondly, any alleged due process violations in the disciplinary hearings below are mooted by the suspension of all penalties imposed upon petitioner. Thirdly, petitioner's claim is wrong on the merits, since the disciplinary regulations merely set forth flexible procedural guidelines and do not in themselves confer any substantive rights rooted in state law. *See Four Certain Unnamed Inmates, supra,* and *Lombardo, supra.* Fourthly, petitioner misconstrued entitlement analysis by taking the content of the regulations as informing due process standards; failure of authorities

to follow specific procedures may give rise to a state law claim, but does not automatically become a federal constitutional issue. Finally, petitioner misreads the regulations themselves and in his discussion (Petition, pp. 26-27), relies upon time limits for "minor" matters, which are not applicable to the "major" disciplinary assault charges lodged against O'Brien.

In sum petitioner raises no meritorious issues and no significant questions; there is accordingly no justification for certiorari.

Conclusion

For the foregoing reasons, the Petition seeking a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit ought to be denied.

Respectfully submitted,

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1453

GORDON O'BRIEN,
Petitioner,

v.

FRANK A. HALL,
Respondent

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Several factual errors in respondent's brief in opposition mandate correction, as they may lead the Court to conclude that the factual basis of the case is too blurred to present in sufficient starkness the constitutional issues raised. No legal rejoinder is necessitated by respondent's brief.

Respondent maintains (p. 5) that ". . .O'Brien remained in Block 10 by his own choice after February 20, 1976, when the Commissioner offered to move him to a far less restrictive general population housing area in MCI Walpole." That misrepresents the facts, as the respondent well knows, and yet it is routinely proffered in his Statement of the Case. In

making this correction, and the others below, petitioner will, of course, restrict himself to matters of record in the court below, a discipline wildly abandoned in respondent's brief, as is noted further herein.

Prior to the extensive hearings culminating in the district court's Order of April 28, 1976, granting the preliminary injunction, the court had entered a temporary restraining order to enjoin respondent "from continuing the confinement of the [petitioner] in segregation in 'Ten Block' . . ." in a Ruling and Order dated February 19, 1976. (Reference to this stage of the proceedings had not before seemed relevant.) One part of that Order said:

> "As to plaintiff's possible transfer to the general prisoner population at M. C. I. Walpole, the plaintiff himself testified that because of the disciplinary reports filed against him, his life would be in danger if he is confined with the general prisoner population at Walpole. On the present state of the evidence I find that this is probably true."

The court refused to return petitioner to Bridgewater, as he asked, but ordered his release from Ten Block and his transfer to the, so-called B Side at Walpole. The court did not appreciate the fact that B Side confinement was, as the respondent says, part of the "general population housing area in MCI Walpole." The respondent and his agents well knew, however,

and that simple compliance with the court's mistaken order amounted in all probability to the execution of a death sentence on petitioner, given the jungle code obtaining. Yet the very next day, February 20, 1976, respondent's agents came to petitioner's Ten Block cell to take him to B Side. He refused. Court approval was obtained for him to remain in Ten Block, with the preliminary injunction hearings scheduled to begin in two weeks. When the court came to understand the situation after those more extensive hearings the injunctive relief specified petitioner's transfer to some general population out of Walpole entirely -- anywhere else (except still not back to Bridgewater). (That relief was then stayed pending appeal, as noted in the petition, and petitioner remained in Ten Block approximately six months more -- more than a year total.)

Those are the facts. It is not only a misrepresentation, but a macabre joke, for the respondent to say that "O'Brien remained in Block 10 by his own choice after February 20, 1976 . . ." That was still five months after his transfer, of course, and the relief here sought still viable, but petitioner did not want the Court to gain the impression that some element of voluntariness, waiver, or whatever, lurked in the record here to tip the scales against granting the writ or require an eventual order that certiorari had been improvidently granted.

Next, the respondent presents as facts (ps. 4-5) a detailed comparison of Ten Block conditions and those in the Walpole, so-called, "isolation" cells, to support part of his Statement of the Case that the petitioner "was not placed in 'solitary', . . ."

because "the Massachusetts term for 'solitary'" is, he says, "isolation", which, he also says, petitioner "acknowledges." Petitioner, of course, does not so acknowledge at all, but argues in his petition (ps. 17-21) that for constitutional purposes Ten Block is "solitary," and he relies on that argument. The "facts" propounded by the respondent contrasting the Eden of Ten Block with what he says is "solitary" appear nowhere in the record of this case. They are fabrications of his own perceptions, nothing more. Nowhere is there any record reference to permit even an inference of one of those "facts." Nowhere, of course, is there any support for his "fact" that only what Massachusetts calls "isolation" is "solitary" -- nor could there be. No one has made that equation, and no one but this Court can, within the parameters of the constitutional question here presented. It was because there was no record authority for a description of the conditions in Ten Block (let alone contrasting them with the "isolation" cells) that petitioner in his petition (p. 18) had to refer the Court to the "restrained description" in Daigle v. Hall, 387 F. Supp. 652 (Mass. 1975). That seemed the only responsible thing to do. It still does. Interestingly, however, even the respondent (p. 4) says that Ten Block confinement "segregated [petitioner] from the rest of the prison population." That alone would be sufficient for the courts cited on pages 19 and 20 of the petition to amount to "solitary" for constitutional purposes. But only this Court may decide.

Respondent is also wrong in saying (p. 10) that the First Circuit has already held in two cases that the regulations here alternatively relied on by petitioner do not create "rights rooted in state law"

sufficient to invoke due process. Petitioner took pains to obviate any such misreading of those cases, saying in his petition (p. 27):

> ". . . Note well that these disciplinary regulations are not the reclassification regulations the Court assessed in Meachum, which were the same regulations this lower court also found not to constitute a substantive right in Four Unnamed and Lombardo, supra." (Emphasis supplied.)

A reading of the cases will easily demonstrate that petitioner is correct. Words mean what respondent says they mean only in the Massachusetts Department of Correction.

The next to last sentence in respondent's brief (p. 11) contains the last in this litany of factual errors. The time limits for permissible segregation without a hearing relied on by petitioner and contained in the effective regulations are not just for "minor" matters, but apply to the "major" matters with which petitioner was charged. A reading of them (ps. 52-56 of Appendix to Petition) will so demonstrate.

The facts are thus corrected.

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